REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CIVIL SUIT NO. 84 OF 2020

IN THE MATTER OF: DHANJAL BROTHERS LIMITED

And

IN THE MATTER OF: Article 5(a) and (c) ARTICLES OF ASSOCIATION

And

IN THE MATTER OF: Section 506 (5) COMPANIES Act

IN THE MATTER OF: Section 85 COMPANIES (GENERAL REGULATIONS) RULES

BETWEEN

DHANJAL BROTHERS LIMITED.....APPLICANT

-VERSUS-

JOGINDER SINGH DHANJAL AND SUKHWANT KAUR DHANJAL KUNDI

(both sued as the administrators) of the ESTATE OF JASWANT SINGHDHANJAL.....RESPONDENTS

R U L I N G

1. By an Application dated 19/5/2020, the Respondents herein have sought orders that :-

1) Spent

2) That ,honourable P.J. Otieno Judge to recuse himself from hearing this matter having pointed out during the first Microsoft Teams Hearing of possible conflict of interest heard and determined some of the parties in Winding Up cause No. 5 of 2014 involving Dhanjal Brothers Limited which also involved Daljit Singh Dhanjal and Joginder Singh Dhanjal and upon recusal the remainder of this Application involving prayers (c) to (f) both inclusive be heard and deteremined by another Judge in Mombasa High Court other than Honourable P.J. Otieno Judge.

3) That, this Honourable Court do grant stay of proceedings in this suit pending the inter-partes hearing and determination of this Application and Mombasa High Court Probate and Administration Succession Cause Number 20 of 2006 Estate of Jaswant Singh Dhanjal; Joginder Singh Dhanjal vs Daljit Singh Dhanjal & 4 others pending in Court and coming for hearing on 22ND june 2020 and 23RD June 2020 which is a Court of concurrent jurisdiction.

4) That, this Honourable Court do strike out this originating Summons dated 22ND April 2020 and the Chamber Summons Application dated 5th May 2020(though pointed by Deputy Registrar the Application is dated 5th April 2020) with costs to the Respondent/Applicants.

5) That, this honourable Court be pleased to set aside and vacate the interim orders issued on 5th May 2020 and 12th May 2020

pending the hearing and determination of this Application and Mombasa High Court Probate and Administration Succession Cause Number 20 of 2006 Estate of Jaswant Singh Dhanjal; Joginder Singh Dhanjal vs Daljit Singh Dhanjal & 4 others pending in Court and coming for hearing on 22ND June 2020 and 23RD June 2020.

6) That, the costs of this Application be awarded to the Respondents and be personally borne by the Law Firm of Wanjiku & Wanjiku Associates Advocates.

2. The Application is premised on the grounds set out therein, and is supported by Affidavit sworn on 19/5/2020 by **SUKHWANT KAUR DHANJAL KUNDI** who is the 2nd Respondent with the authority to plead on behalf of **JOGINDER SINGH**. The deponent, inter alia, avers that during a Microsoft Teams session, the Court pointed out a potential conflict of interest and asked Counsel to get instructions and confirm whether there were any objections in view of the handling of Winding up cause 5 of 2014.

3. The 1st Respondent in support of the Application filed an Affidavit sworn 22/5/2020. He avers that he is convinced that the Court breached their fundamental rights to a fair hearing and natural justice by allowing the Application 5/5/2020 in terms of orders 1,2,3 despite being mandatory in nature and which has severe consequences in respect of the his rights as a Shareholder of the Company. Therefore, they were not given an opportunity to present their case properly before the honourable Court issued interim orders issued on 11/5/2020. Furthermore, the Court directed that the Originating summons be heard on 26/5/2020 despite the Applicants Originating summons having been given a hearing date of 12/5/2020 by **Hon. Justice Ogola**. Therefore, owing to such improper exercise of judicial authority and discretion, a fair hearing will not be accorded by the Court.

4. The 1st Respondent further avers that while in a Virtual meeting of 12/5/2020, the Court openly exhibited bias towards the Respondents and favoritism towards the Applicant and even intimated that there may be a conflict of interest due to him presiding over Winding Up cause no. 5 of 2014 involving the Applicant and the 1st Respondent. Further, it is averred that the Court has exhibited bias to the 1st Respondent while handling yet another motion filed by the Applicant herein in Miscellaneous Cause No. 387 of 2019 between **Dhanjal Brothers Limited vs Joginder Singh Dhanjal & Another.** Consequently, it is just and fair for the Court to recuse itself from hearing this matter.

The Reponse by the initial applicantRespondent (henceforth called the company)

5. When served, the Applicant opposed the Application by the 1st Respondent on the basis of a Replying Affidavit sworn on 22/5/2020 by **Daljit Singh Dhanjal** who is a Director and Shareholder of the Applicant. He, inter alia, avers that it is fact that this Court presided over the winding up cause against the Applicant being, **Winding Up Cause No. 5 of 2014** which had been instituted by the Administrator **Joginder**. However, the Court only declined to grant an Application seeking to strike out the Petition. Therefore, it did not hear the Petition substantively. Thereafter, the Petition was struck out vide an Application for review by the Company when it emerged that the agreement by which the petitioner became a shareholder was null and void.

6. The Applicant avers that the Application for recusal on grounds that the Court presided over the Winding Up Cause is misplaced and intended to delay the expeditious hearing and determination of the Originating Summons, since the Application for recusal does not disclose what interest the Court has in the matter that evidences conflict and/or what will make the Court to lack impartiality, competence or objectivity.

7. The Applicant further avers that the Respondents are in fact forum shopping by seeking the recusal of this Court. Therefore, the Respondents cannot be allowed to choose an arbiter over a dispute involving it as the administrator **Sukhwant** is seeking. Further, it is averred that the other Court presided by **Chepkwony J** also presided over another suit involving the Applicant herein, the administrator **Joginder** and the deponent herein, being **HCC 74 of 2017** which suit was dismissed by that Court. Consequently, if the Respondent is to be understood, the Applicant's right to fair hearing will then be fettered, as no Judge in the division will be competent to hear the dispute based on the grounds advanced.

Submissions

8. On the 29/5/2020, this Court directed that Application be dispensed with by way of written submissions. The Applicant filed its submissions on the 12/8/2020, the 1st Respondent's submission were filed on 18/6/2020, while the 2nd Respondent's 16/6/2020.

9. On whether this Court should recuse itself, **Mrs. Kipsang** Learned Counsel for the 2nd Respondent submitted that the Court is biased since it brushed off the issue raised by the 2nd Respondent's Counsel that there was no proper service without making any notable reprimand, went ahead to grant interim orders in terms of prayer 1, 2, 3 and 4 in Application dated 5/5/2020 on the 11/5/2020 which was a day before the inter- parte hearing on 12/5/2020. Further, Counsel submitted that the Court extended the interim orders despite a challenge on jurisdiction of the Court being raised due to concurrent jurisdiction.

10. **Mrs. Kipsang** submitted that the Court has expressed and demonstrated open bias against the 2nd Respondent by declining to vacate the interim orders issued on 12/5/2020 on a non-existent Notice of Motion and non-existence of any competent Application before it.

11. In support of the submissions on bias, Counsel cited the following authorities: ***Jasbir Singh Rai & 3 Others -Vs- Tarlochan Singh Rai & 4 Others (2013)eKLR; Kaplana H. Rawal V Judicial Service Commission & 2 Others [2016] eKLR; Philip K. Tunoi & Another V Judicial Service Commission & Another [2016] eKLR And Charity Muthoni Gitabi V Joseph Gichangi Gitabi (Substituted By) Michael Wachira Gitabi [2017] eKLR***

12. **Mr. Wafula** Learned Counsel for the 1st Respondent reiterated the contents of the 1st Respondent Replying Affidavit and submitted that although recusal is a matter of discretion, it is clear that the Respondents are doubtful of the courts impartiality and the Respondent are

apprehensive that their right to a fair hearing as envisaged under Article 50(1) of the Constitution will not be guaranteed owing to the Court's own admission about conflict of interest due to it presiding over winding up Cause No. 5 of 2014.

13. In support of the submission on recusal, **Mr. Wafula** cited the finding in **Kenya Hotel Properties Limited v Attorney General & 4 others [2016] eKLR** where the Judge had also expressed doubts on proceeding with the Petition.

14. **Mr. Masinde** Learned Counsel for the Applicant on the issue of recusal submitted that the Court initially indicated to the parties that it had determined a previous dispute involving some of the parties in the matter and inquired whether all parties were comfortable with its continued handling of the matter. All the parties indicated that they were comfortable save for the 2nd Respondent's Counsel who indicated that she would take further instructions from her client.

15. For the applicant, submissions were made to the effect that the query posed to the parties by the Court did not express the Court's opinion one way or another. Rather, the Court was only inviting the opinion of the parties having noted that there had been a dispute before it involving some of the parties. Consequently, he added,the 2nd Respondent is well within her right to move the court seeking recusal hoowever, for the prayers to be allowed grounds for recusal have to be disclosed and the fact that the Judge heard a previous matter involving the same parties or one of the parties is not a fact a reasonable person would infer possibility of bias as was stated in Philip ***K. Tunoi & Another V Judicial Service Commission & Another(supra).***

16. On conflict of interest, Counsel submitted that there is always a presumption of impartiality of a Judge as was held by Lady Justice N. Ndungu, SCJ in **Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR.** The 2nd Respondent has not disclosed by that fact, which interest can result in conflict, and a nexus between the fact the Judge determining a previous suit involving the parties and conflict has not been established. Therefore, the allegations of bias and conflict of interest are bare allegations since reasonable grounds have not been presented from which an inference of bias may be drawn. Counsel urged the Court to disallow the prayer for recusal.

Analysis and Determination

17. This Court has considered all the material canvassed in respect of the Motion. Its careful reading of all the issues raised in this Application leads it to the understanding and isolate a single issue for determination, which is whether the grounds of recusal have been laid.

18. The instant Application grounded on Article 50 (1) of the Constitution which provides: ***"every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body"***. As a general rule, judges are required to disqualify themselves from hearing a case when the Judge's impartiality might reasonably be called into question. There is a fundamental right to an impartial tribunal, and a biased judge robs a party of due process of law. In **Homepark Caterers Limited vs. The Hon. The Attorney General & 3 Others [2007] eKLR,** after an exhaustive analysis of judicial authorities within and without Kenya, the Court adopted and approved 10 benchmarks as set out in **LOCABAIL (UK) LTD v BAYFIELD ROPERTIES LTD [200] QB 451** to be that there are several scenarios including those where the danger is so real that a Judge should recuse himself from the case before any objection is raised; where for solid reasons, the Judge feels personally embarrassed in hearing the case; where it is highly desirable, if extra cost, delay and inconvenience are to be avoided, that the Judge should stand down at the earliest possible stage, not waiting until the eve of the day of hearing, where the judge takes the view that parties should not be confronted with a last minute choice between adjournment after a valid objection; where the Judge becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing for them to take positions and it will be the duty of the Judge to consider that objection and exercise his judgment upon it; and a Judge would be wrong to yield to a tenuous or frivolous objection as he would, to ignore an objection of substance.

19. Where the facts before the reviewing court lead to the apprehension of the reasonable suspicion test, the Court of Appeal adopted the principle set out in the Constitutional Court of South Africa in the case of **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA v SOUTH AFRICAN RUGBY FOTBALL UNION 1998(4) SA 147 at 177** in the following words:

> **"It follows from the foregoing that the correct approach to this application for recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or propositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial office should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer for whatever reasons was not or will not be impartial."**

20. Being in the nature of a tool to safeguard independence concomitantly with the judicial officer's duty to remain impartial and bereft of bias it must be viewed with circumspection lest it be used as a tool of abuse or just to defeat justice. Therefore, in **Re JRL exp CJL Re** (1986) **161 CLR 342 at 352 Mason J** the Australian High Court underscored the need to strike a balance and said:

> **"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."**

22. For this case however, I find the last rule by the court as more inspiring and of good guidance. The court picked the decision In the case

of **CLENAE case [1999] VSA 35** Callaway JA observed para 89(e)in which it was said

> **"As a general rule it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions a judge or magistrate should not accede to an unfounded disqualification application.**
>
> **A judges' religion, ethnic or national origin, gender, age, class, means or sexual orientation cannot form a sound basis of an objection. Nor, ordinarily can an objection be soundly based on the judge's social, educational, service or employment background or that of his family, his previous political associations; his previous judicial decision; his extra curricular utterances; his previous receipt of instructions to act for or against any party, advocate solicitor engaged in a case before him, or his membership of the same Inn, circuit, Local Law Society or Chambers." (**emphasis provided)

23. Naturally, the question to be answered by the court once the facts are laid before the court is whether a reasonable and informed fair minded man sitting in court with all the facts would have a reasonable suspicion that a fair trial for the respondents herein was not possible. The test for the recusal of a judge is objective, the facts constituting bias must be specifically alleged and established, and the court must shut its eyes to the fact that the Respondents/Applicants may be left dissatisfied and bearing a sense that justice would not or might not be done. It is not enough to simply seek a recusal. See **Porter –v- Magill [2002] 1 All ER 465.**

24. In the instant case, the recusal is sought on the basis of a query posed by the Court to all parties on whether they were comfortable with the Court proceeding with the matter, noting that the Court had determined a dispute involving the Applicant herein and the 1st Respondent in Winding Up Cause No. 5 of 2014 and secondly that the Court decline to discharge the interim orders issued in chamber summons dated 5/4/2020 and filed on 8/5/2020.

25**. I**t is important at this juncture to revisit the background and genesis of the question posed to the parties by the court. On that day, while the two counsel haggled over the fate of the orders issued on 11.5.2020, counsel for the second defendant appeared overly agitated and querulous just falling short of saying the court was biased in giving the ex-parte orders. That conduct reminded the court of the proceedings in **Winding Up Cause Number 5 Of 2014** in which the 1st respondent here was the petitioner, always attended court and at times opted to address the court in person. In that matter I considered a number of applications, referred parties to ADR having appreciated that they are blood brothers and even suggested to then a buy out after the shares were valued, but the dispute could not be solved otherwise until an application was brought to strike out the cause on the basis that the allocation of shares to the 1st respondent had been declared null and void by the family court. Based on the fact of the application founded on a court decree, the petition was struck without being heard on the merits. Upon that recollection and while noting that the 1st respondent was in attendance online I asked if my decision in that matter would, in their opinion, make them doubt my impartiality. To that question both respondents answered that they had no such fears. If candour was to prevail upon counsel, it should appropriately be reported that the court asked parties their opinion and the parties had no reservation. It however appears that these days, etiquette and the duty to be candid with the court by officers of the court is less fashionable while disparaging every judicial officer at every turn is more attractive.

26. I must say that I posed the question so that if at that time the parties had expressed any reservations I would have, to save time, easily referred the matter for reallocation. That having not been done the affidavit filed in support of this application must thus be seen to run away from what the parties told the court. That is the kind of conduct counsel should discourage even if pushed by the client. But here we are; is there demonstrated prospects or likelihood of bias or conflict of interest. My studious reading of the papers filed reveal no material to lead a reasonable man in apprehending bias or impartiality rather it paints the picture of conjured trick with bones. The test to be applied must be objective and never subjective. It is not enough that having decided one litigation in favour or against a litigant make a judge unfit to ever handle any subsequent dispute by that party. If that that were to be the law, I wonder were commercial banks who sue and get sued repeatedly in our courts would source judges for their disputes. In **Kenya Hotel Properties Limited v Attorney General & 4 others (supra)** the court said

> **"Reasonable apprehension of bias on the basis of prejudgment or predetermination should nevertheless be firmly and clearly established. Instances of previous decisions by a judicial officer on matters of law as well as fact which may generate an expectation that the judicial officer is likely to decide an issue in a manner unfavorable to one of the parties should not mean that the judicial officer will approach the case with partiality and prejudice unless the previous decisions were rendered with utmost trenchant and conviction as to shut out any other line of thought. Likewise , the mere fact that a party has been previously unsuccessful before the same judge should not prompt and lead to a recusal."**

27. In this Court's view, even though the rule is that bias does not have to be real and the test is merely possibility of bias, it is noteworthy that the reasons for seeking recusal of a judge should be cogent and sufficient to raise a possibility of bias. There should be evidence of resultant miscarriage of justice as in the case where a judge's position on an issue is known say from earlier comments or conduct**.** The Court of Appeal in **Kaplan & Stratton v L.Z. Engineering Construction Ltd & 2 others [2001] eKLR held:**

> **"If an allegation of apparent bias is made, it is for the Court to determine whether there is a real danger of bias in the sense that the judge might have unfairly regarded with favour or disfavor the case of a party under consideration by him or, in other words, might be predisposed or prejudiced against one party's case for reasons unconnected with the merits of the issue. It is for the Court, to which application is made, to decide, on all the evidence then before it, whether such real danger existed at the time when the impugned decision was taken."**

28. The Respondents in support of their allegations for the recusal of this Court, stated that there was lack of proper service of pleadings by the Applicant. Further, in the 1st Respondent's Counsel's view, this Court brushed off the allegations of lack of proper service without making any notable reprimand. Secondly, it is alleged that this Court granted interim orders in terms of prayers 1,2, 3 & 4 on the 11/5/2020 which was a day before the *inter-partes* hearing on 12/5/2020 and the Court went ahead to extend the interim orders despite a challenge on

jurisdiction of the Court being raised due to concurrent jurisdiction. Finally, it is alleged that the Court demonstrated open bias when it declined to strike out the Chamber Summons Application and vacate the interim orders issued thereon when Counsel for the Respondent brought to the attention of the Court that the interim orders where issued on a non-existent Notice of Motion Application and non-existence of any competent Application before the Court.

29. On the issue of proper service of pleadings, it is on record that after the issue of lack of proper service was raised, and by the consent of the parties, the following were adopted as the order of this Court:

> ***"***
>
> ***i. Mrs. Kipsang has 30 days from today to file and serve responses to the O.S***
>
> ***ii. Upon service Ms. Ndwati will have 21 days to file written submissions together with any supplementary Affidavit.***
>
> ***iii. After submissions shall have been filed by the Applicant, the Respondent shall have 21 days to file nd serve submissions."***

30. This Court even went further and ordered that the respondents be served with hard copies of the Originating Summons and Application before close of the day. From the foregoing, this Court finds that the allegations on bias on the issue of lack of proper service is misguided and the allegations have failed to prove the possibility of bias.

31. On the issue of this Court declining to strike out the Chamber Summons Application and vacate the interim orders issued thereon. It is noteworthy, that on the 12/5/2020, the Court directed the Respondents file an appropriate Application if they felt aggrieved with the interim orders issued on the 11/5/2020. To date, no such Application has been filed by either Respondent. A court must make a determination one way or the other and a decision on whether to strike out a matter or discharge orders upon an oral application can never be proof of impartiality, bias prejudice or indeed misconduct. Litigants and their advocates who hold that their way is the only way and that they can only lose on account of impropriety must be reminded that such is a bully's approach to dispute resolution and not acceptable.

32. On the issue of the possibility of conflict of interest as a result of this Court having heard and determined Winding Up Cause No. 5 of 2014 instituted by **Joginder Singh Dhanja** against **Dhanjal Brothers Limited** and **Daljit Singh Dhanjal** it is important to point out that the 1st Respondent was never a party in that litigation. My decisions in that matter, which have never been contested by way of appeal or review were based on the material availed when applied to the law. As said before, invoking that decision maybe the excuse not the reason for seeking recusal.

33. I find that the Respondents have failed to lead any evidence to demonstrate the possibility of bias and/or conflict of interest by the Court. They have also failed to discharge their burden of proof and they have therefore failed meet the threshold to merit an order for recusal. Being persuaded by holding of **Lakha J** in **Kaplan & Stratton v L.Z. Engineering Construction Limited & 2 others (supra),** I hold, being satisfied that I am able to remain impartial, that there is no such danger or possibility of bias and/or conflict of interest in the instant case to justify my recusal.

34. In the light of the above and applying the above principles, the Respondent's prayer for recusal in Application dated 19/5/2020 is therefore dismissed with costs which I direct shall abide the outcome of the Originating Summons.

35. However, while this ruling was pending delivery, there have occurs developments which makes the application and this ruling unnecessary. I have received a letter of transfer from this station with effect from the 1.11.2020. That development effectively removes the matter from my docket to the docket of a judge the presiding judge will decide when other judges report to the station.

Dated, **signed** and **delivered** at **Mombasa** this **25th** day of **September 2020**

P J O OTIENO

JUDGE